

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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**Case No. A-6287
APPEAL OF THE WEST MONTGOMERY CITIZENS ASSOCIATION
AND C.O. NORTH**

OPINION OF THE BOARD

(Hearing held November 18, 2009)

(Effective Date of Opinion: January 29, 2010)

Case No. A-6287 is an administrative appeal filed by Norman Knopf, Esquire, on behalf of the West Montgomery County Citizens Association and C.O. North ("Appellants"), who assert that a letter issued by the County's Department of Permitting Services ("DPS") and dated December 31, 2008 incorrectly revoked a previously-issued stop work order in connection with building permit 480064 for construction at 9404 Falls Road, Potomac, Maryland 20854 ("the Property"). More specifically, Appellants charge administrative error on the part of DPS and appeal the issuance of the December 31st letter, which they assert is an administrative decision reversing an earlier determination that the construction of a commercial miscellaneous structure at the subject Property required a special exception.

Pursuant to Section 59-A-4.4 of the Montgomery County Zoning Ordinance, codified as Chapter 59 of the Montgomery County Code (the "Zoning Ordinance"), and Section 2-112 of the Montgomery County Code, the Board scheduled a public hearing on this appeal for November 18, 2009. At the outset of that hearing and pursuant to its authority in Section 2A-8 of the Montgomery County Code, the Board heard oral argument on a Motion to Dismiss submitted by Intervenor Sprint Nextel. Norman Knopf, Esquire, represented the Appellants. Sean P. Hughes, Esquire, represented Intervenor Sprint Nextel. Assistant County Attorney Malcolm Spicer represented DPS.

Decision of the Board: Motion to Dismiss **Granted**;
 Administrative Appeal **Dismissed**.

RECITATION OF FACTS

The Board finds, based on undisputed evidence in the record, that:

1. The subject Property is known as 9404 Falls Road, Potomac, Maryland, 20854 (Parcel NO27), and is located in the R-200 zone.
2. Building Permit No. 480064 was issued on April 9, 2009, for the construction of a commercial miscellaneous structure at the subject Property, to include a 24' x 24' fenced area, a 12' x 20' equipment shelter and foundation, a 6' x 12' generator pad and generator, and a CSC cabinet and Stangwell pull box. See Exhibit 14, page 3. That permit was not appealed.
3. As stated in the Intervenor's Motion to Dismiss, on April 25, 2008, DPS issued a Stop Work Order regarding Building Permit No. 480064. On or around October 2, 2008, the Intervenor delivered a letter to DPS, requesting a determination as to whether Building Permit No. 480064 had been properly issued, and, consequently, whether the Stop Work Order should remain in effect. See Exhibit 8. See also Exhibit 14, pages 6-8.
4. On December 31, 2008, Carla Reid, the Director of DPS, sent a letter to counsel for the Intervenor stating that on privately owned land such as the subject Property, a telecommunications facility is a permitted use, provided it complies with Section 59-A-6.14. The letter goes on to note that if the use exceeded the limits contained in that Section, then a special exception would be required. In conclusion, the letter states that it is DPS' position that Building Permit No. 480064 was properly issued. See Exhibit 3. As a result, the Stop Work Order was lifted.
5. Appellants filed this administrative appeal on January 30, 2009, asserting that the December 31, 2008, decision to revoke the Stop Work Order on Building Permit No. 480064 was issued in error. The Appellants asserted that the Stop Work Order should not have been revoked because the work allowed by the Building Permit requires special exception approval and mandatory referral to Park and Planning, neither of which has been applied for or obtained. See Exhibit 1.

SUMMARY OF ARGUMENTS

6. Counsel for the Intervenor filed a Motion to Dismiss this case on March 23, 2009. In that Motion, Counsel asserted that the Board should dismiss this appeal for lack of jurisdiction under its authority in Board Rule 3.2.1. Counsel argued that the lifting of a Stop Work Order is not an appealable action. In support of this, Counsel initially directed the Board's attention to the Montgomery County Circuit Court's recent decision in the Petition of Jodi Longo, et al., for Judicial Review of the Decision of the Board of Appeals for Montgomery County, Case No. A-6185, in which case the Circuit Court ruled in a written decision dated June 13, 2008, that the Board did not have jurisdiction to hear an appeal regarding the lifting of a stop work order.¹ Counsel argued that pursuant to Section 8-23(a) of the County

¹ See attachment labeled "Exhibit 4" to (BOA) Exhibit 8. Counsel acknowledged in his Motion to Dismiss that an appeal of the Circuit Court decision in the *Longo* case was pending with the Court of Special Appeals. Counsel later

Code, any concerns about Building Permit No. 480064 should have been filed as an appeal to the Board of Appeals within 30 days of the issuance of the permit (i.e. by May 9, 2008), and were now time-barred. Counsel argued that the revocation of a stop work order is simply a confirmation that the initial approval of the underlying building permit was proper and that any asserted legal concerns regarding its issuance were unfounded. Counsel cited to two Maryland cases in support of his position, *National Institutes of Health Federal Credit Union v. Hawk*, 47 Md. App. 189, 195, 422 A.2d 55, 58 (1980) *cert. denied* 289 Md. 738 (1981), and *United States Parcel Service v. People's Counsel for Baltimore County*, 336 Md, 569, 650 A.2d 226 (1994).

In his Motion to Dismiss, in addition to his argument under Board Rule 3.2.1, Counsel for the Intervenor also cited to Board Rule 3.2.2, Motion for Summary Disposition. Counsel argued that because there is no genuine issue regarding the timeliness of the filing of the appeal, it should be dismissed. Counsel noted that the building permit was issued on April 9, 2008, and thus that any appeal thereof had to be filed by May 9, 2008, which did not happen. For that reason, Counsel asserted that if this matter were not dismissed for lack of jurisdiction, it should be summarily dismissed because there is no genuine issue of fact to be resolved.

Counsel filed a Supplement to his (then-) pending Motion to Dismiss on October 26, 2009, addressing the July 7, 2009, reported decision of the Court of Special Appeals in the Longo case.² In that Supplement, Counsel distinguished the Court's decision in Longo from the instant situation. Counsel argued that the revocation of a stop work order is not an appealable decision under the facts of the instant case because, unlike the situation in Longo, there was no new factual information presented after the issuance of the building permit by DPS, nor was a revised building permit issued. Counsel argued that the revocation in the instant case of the stop work order was not a final decision, but rather was simply a confirmation of the original permit issuance. See Exhibit 15(a). Counsel went on to renew his request that the Board dismiss the Appellants' appeal under Board Rule 3.2.1, Board Rule 3.2.2, or any other applicable County or State law.

At the hearing, Counsel reiterated the arguments made in his written submissions. He argued that the decision to lift the stop work order was not a reversal by DPS and that unlike the situation in Longo, in the instant case there are no new facts and no changes to the original permit. Counsel argued that the case law is clear, and that Longo is the exception, not the rule. Counsel reiterated that the original building permit could have been appealed but was not. He asserted that even if the stop work order tolled the time period for filing an appeal (which he stated in his written materials it does not), the appeal was still filed outside of the allowable 30-day period. He argued that the appeal rules are

filed a Supplement to his Motion to Dismiss addressing the decision of that Court. *Montgomery County, Maryland v. Longo*, 187 Md. App. 25; 975 A.2d 312 (2009) *cert. denied* ___ Md. ___ (November 13, 2009).

² The Court of Special Appeals' decision in the Longo case is in the record at Exhibit 15(b), pages 3-37.

in place to allow some finality to the process, and that his Motion to Dismiss should be granted.

7. On November 6, 2009, Counsel for the Appellants filed the Appellants' Opposition to Intervenor's Motion to Dismiss. See Exhibit 16(b). Counsel for the Appellants argued that under Section 8-23(a) of the County Code, a person aggrieved by "any other decision or order" of DPS could appeal the issuance of that decision within 30 days. Counsel argued that DPS' December 31, 2008 lifting of the April 25, 2008 stop work order issued in connection with Building Permit No. 480064 constituted a decision or order of DPS which can be appealed under Section 8-23, and thus that the Motion to Dismiss should be denied. In support of this position, Counsel cited to the decision of the Court of Special Appeals in the Longo case. Counsel argued that in the Longo decision, the Court of Special Appeals rejected the argument that the lifting of a stop work order was not appealable by noting that it was neither a reaffirmation of the original decision to issue the stop work order, nor an explanation of the prior decision to enter a stop work order.

Counsel argued that the instant case can be distinguished from the Hawk case because the facts are different. Counsel asserted that unlike Hawk, the lifting of the stop work order at issue in this case was not a reaffirmation of the original decision to grant the stop work order, but rather a reversal of that position. Counsel argued that the UPS case is similarly inapplicable because in the instant case, DPS has not explained its prior decision, but rather has reversed it.

At the hearing, Counsel reiterated the arguments stated in his Opposition, arguing that Longo governed, and asserting that if the lifting of a stop work order were not appealable, the appeal process made no sense.³ When asked by a Board member how he would address language in Longo that distinguishes the facts of that case from the facts in Hawk and UPS, Counsel stated that in Longo, the lifting of the stop work order was not merely a reaffirmation of the prior issuance of a building permit, but rather was a decision by DPS based on new factual information and the submission of a revised building permit application, Counsel for the Appellants stated that in the instant case, we have a separate and distinct decision, and that under Section 8-23(a) of the County Code, any decision is appealable. See Exhibit 15(b) at page 29. In response to a Board assertion that the Longo case essentially carved out an exception to the precedent set by Hawk and UPS, that it makes clear that the decision to look at is the issuance of the building permit (not the stop work order), and that Longo involved new facts, Counsel for the Appellants replied that the instant case does involve new facts relating to why the building permit should not have been issued. When asked if the instant case involved any changes to the construction proposed under the original building permit, Counsel answered that it did not. Counsel later argued that the instant case does involve a change in that there was a specific determination to issue a stop work order, and then a reversal of

³ Counsel later clarified that he believes the position advanced by the Intervenor would require citizens to file an appeal with the Board even where they have succeeded in getting DPS to issue a stop work order.

that position in the form of the decision to lift that order, based on a change in agency determination. Towards the end of the argument, Counsel conceded that the issue in the instant case is not directly addressed in *Longo*, but continued to assert that the lifting of this stop work order was a substantive decision of major importance, taking it out from under the *Hawk* and *NIH* cases. Counsel acknowledged that the stop work order does not say why it was issued, but argued that one can infer that it was issued because Park and Planning had indicated a special exception was needed for this construction. See attachment labeled "Exhibit 5" to (BOA) Exhibit 8.

8. Counsel for the County stated that because of complaints it had received, DPS had issued a stop work order so that it could consider whether a special exception was needed for this construction. Counsel went on to state that, after review, DPS determined that the original building permit had been correctly issued. He argued that this was not a change of position by DPS, and stated that there were no changes made to the originally-submitted construction plans.

CONCLUSIONS OF LAW

1. Section 2-112(c) of the Montgomery County Code provides the Board of Appeals with appellate jurisdiction over appeals taken under specified sections and chapters of the Montgomery County Code, including Section 8-23.
2. Section 2A-2(d) of the Montgomery County Code provides that the provisions in Chapter 2A govern appeals and petitions charging error in the grant or denial of any permit or license or from any order of any department or agency of the County government, exclusive of variances and special exceptions, appealable to the County Board of Appeals as set forth in Section 2-112, Article V, Chapter 2, as amended, or the Montgomery County Zoning Ordinance or any other law, ordinance or regulation providing for an appeal to said board from an adverse governmental action.
3. Under Section 2A-8 of the Montgomery County Code, the Board has the authority to rule upon motions and to regulate the course of its hearings. Pursuant to that section, it is customary for the Board to dispose of outstanding preliminary motions at the outset of the hearing.
4. Section 8-23(a) of the Montgomery County Code reads as follows:

Sec. 8-23. Board of Appeals.
(a) Any person aggrieved by the issuance, denial, renewal, or revocation of a permit or any other decision or order of the Department under this Chapter may appeal to the County Board of Appeals within 30 days after the permit is issued, denied, renewed, or revoked, or the order or decision is issued.
5. Board Rules 3.2.1 and 3.2.2 provide the Board with the following authority:

3.2 Motions to Dismiss.

3.2.1 Motion to dismiss for lack of jurisdiction. A party may at any time move to dismiss any issue in a case on the grounds that the Board lacks jurisdiction.

3.2.2. Motion for summary disposition. Any party may file a motion to dismiss any issue in a case on the grounds that the application and other supporting documentation establish that there is no genuine issue of material fact to be resolved and that dismissal or other appropriate relief should be rendered as a matter of law. The motion should be supported by documents, affidavits, applicable precedent, or other appropriate materials. Unless otherwise approved by the Board, the motion must be made no later than 20 days prior to the hearing. The Board on its own motion may consider summary disposition or other appropriate relief.

* * * * *

6. In this appeal, Appellants urge the Board to view the December 31, 2008, letter from DPS Director Carla Reid, which lifted the April 25, 2008 stop work order, as an appealable order or decision under Section 8-23(a) of the Montgomery County Code. Section 8-23(a) requires that appeals be filed within 30 days after an appealable order or decision, and case law in Maryland makes clear that this time limit is jurisdictional and mandatory. See *National Institutes of Health Federal Credit Union v. Hawk*, 47 Md. App. at 196-7, 422 A.2d at 59 (1980). After hearing oral argument and reviewing the written submissions of counsel, the Board finds that the December 31 letter is not an appealable order or decision, but rather is a reaffirmation of Building Permit No. 480064. The Board finds that the December 31, 2008, DPS letter does not make a decision with respect to this permit other than to confirm that it was issued correctly in the first place, and that any appeal in this case originated from the April 9, 2008, issuance of the building permit, which was not appealed within the required 30 days (i.e. by May 9, 2008). Thus the Board concludes that it has no jurisdiction to consider this appeal.

Maryland courts have previously addressed the types of decisions that constitute events or decisions from which appeals can be taken. Counsel for the Intervenor cites *United Parcel Service, Inc. v. People's Counsel* (336 Md. 565, 650 A.2d 226 (1994)), as well as *National Institutes of Health Federal Credit Union v. Hawk* (47 Md. App. 189, 422 A.2d 55 (1980)), as authority for the Board to grant his Motion to Dismiss. The Board finds the reasoning in these cases persuasive.

In *United Parcel Service, Inc. v. People's Counsel for Baltimore County*, the Maryland Court of Appeals explained what constituted an appealable decision for purposes of Article 25A, Section 5(U) of the Annotated Code of Maryland.⁴ In the

⁴ The Board finds that the Court's reasoning in this regard is applicable to the instant case even though as a technical matter, the Board's authority to hear appeals is derived from Article 28 of the Annotated Code, section 8-110(a)(4), which states that the "decisions of the administrative office or agency in Montgomery County shall be subject to an appeal to either the board of appeals or other administrative body as may be designated by the district council. In either county, the appeal shall follow that procedure which may from time to time be determined by the district

United Parcel Service case, neighboring landowners appealed from the zoning commissioner's letter responding to their objection to his previous approval of a building permit application. In his letter, the commissioner explained and defended his prior decision to approve the building permit. The Court reasoned that an appealable event must be a final administrative decision, order or determination. The Court held that the commissioner's response letter was not an "approval" or "permission," but merely the reaffirmation of his prior approval or decision.⁵ The Court reasoned that the words of the State law "obviously refer to an operative event which determines whether the applicant will have a license or permit, and the conditions or scope of that license or permit" The court found that the operative event occurred when the building permit was approved and issued, not when the commissioner sent his explanatory letter. "If this were not the case an inequitable, if not chaotic, condition would exist. All that an appellant would be required to do to preserve a continuing right of appeal would be to maintain a continuing stream of correspondence, dialogue, and requests... with appropriate departmental authorities even on the most minute issues of contention with the ability to pursue a myriad of appeals ad infinitum." 336 Md. at 584, *quoting National Institutes of Health Federal Credit Union v. Hawk*, 47 Md. App. 189, 422 A.2d 55, 58-59 (1980) *cert. denied* 289 Md. 738 (1981).

As stated above, the Board's authority is limited to the review of some "operative event" – that is, the affirmative approval or denial of some permit or other form of permission. This Board is convinced that the December 31 letter lifting the stop work order issued in connection with Building Permit No. 480064 was not a permit approval such as might constitute an operative event, but rather was a reiteration or reaffirmation of an existing permit. Indeed, the December 31 letter states that on its face, recounting the items for which the permit was originally issued on April 9, 2008, and concluding that "it is the Department's position that permit number 480064 was properly issued." See Exhibit 3. Thus the Board concludes that the December 31 letter lifting the stop work order was not a final, appealable decision or order of DPS for the purposes of Section 8-23(a) of the County Code.

7. The Board further finds that this case is not governed by the decision of the Court of Special Appeals in *Montgomery County, Maryland v. Longo*, 187 Md. App. 25; 975 A.2d 312 (2009) *cert. denied* ___ Md. ___ (November 13, 2009).⁶ The Court in *Longo* explained why, under the facts of that case, the lifting of the stop work order was an appealable decision:

council."

⁵ The Board notes that the Court in the *UPS* case relied heavily on the *Hawk* decision, which was a Montgomery County case. In considering an appeal under Section 59-A-4.3 of the Montgomery County Zoning Ordinance, the Court in *Hawk* applied similar reasoning, and quoted with approval an underlying Hearing Examiner report, which had concluded that "The 'decision' which is the subject of [the] Appeals . . . is not a final administrative decision, order or determination. It is at most a reiteration or reaffirmation of the final administrative decision or order of the department granting the original Use and Occupancy Certificate." *National Institutes of Health Federal Credit Union v. Hawk*, 47 Md. App. 189, 195, 422 A.2d 55, 58-59 (1980) *cert. denied* 289 Md. 738 (1981).

⁶ References in this Opinion to the Court of Special Appeals' decision in *Montgomery County, MD v. Longo* have been to the copy provided by the Intervenor at Exhibit 15(b).

DPS was not merely reconsidering whether its initial decision to issue the building permit was correct. Rather, it was assessing whether the building, as constructed, met the requirements for an addition. ... Thus DPS' decision to lift the stop work order was not 'a reiteration or reaffirmation' of its initial decision to issue the permit, as in *Hawk*, 47 Md. App. at 195. Rather, it was a decision made in response to new facts, i.e. demolition to the front wall that was not depicted clearly in the plans that DPS relied upon in issuing the permit. ... Under these circumstances, we hold that the decision to lift the stop work order was an appealable decision or order pursuant to Section 8-23(a).

187 Md. App. at 54-55, 975 A.2d at 329-30. The Board finds that the facts of the instant case are distinguishable from those in *Longo* because in the instant case, there were no intervening changes to the construction plans or revisions to the underlying building permit. The December 31 lifting of the stop work order simply allowed work to recommence under Building Permit No. 480064 as that permit was originally issued. Thus the Board finds that the December 31 letter lifting the stop work order does not fall under the narrow exception created by the *Longo* decision, but rather was a reiteration or reaffirmation of its original decision to issue this building permit, rendering it unappealable under *Hawk* and *UPS*.

8. Pursuant to section 2A-8(i)(5) of the Montgomery County Code, the Board began the hearing by disposing of all outstanding preliminary motions and preliminary matters. Pursuant to this section, Board Rule 3.2.1, and the Board's authority under section 2A-8(h) to rule upon motions, the Board has determined to grant the Intervenor's Motion to Dismiss the instant matter.
9. The Motion to Dismiss Case A-6287 is granted, and Case A-6287 is consequently **DISMISSED**.

On a motion by Vice Chair David Perdue, seconded by Member Carolyn Shawaker, with Chair Catherine Titus and Member Stanley Boyd in agreement, and Member Walter Booth necessarily absent and not participating, the Board voted 4 to 0 to grant the Motion to Dismiss and thus to dismiss the appeal, and adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.

Catherine G. Titus
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 29th day of January, 2010.

Katherine Freeman
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within ten (10) days after the date the Opinion is mailed and entered in the Opinion Book (see Section 2A-10(f) of the County Code).

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure (see Section 2-114 of the County Code).